IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1535

LEON TROLL, as Executor of the Estate of MORRIS NEWMAN, Deceased,

Petitioner,

v.

ABRAHAM BORUT,

Respondent

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This memorandum is submitted in opposition to a petition for a writ of certiorari to review a diversity action judgment, which the Court of Appeals for the Second Circuit unanimously affirmed, from the bench, on the written opinion of the District Court Judge. Troll, the petitioner, does not contend that the judgment conflicts with New York law, which governs this diversity action. Instead, Troll asks this Court to resolve a non-existent conflict between the Second and Ninth Circuits and to review a question of New York law, which he erroneously claims was never considered and passed upon by the courts below.

The Court of Appeals affirmed a judgment of the United States District Court for the Southern District of New York ordering Troll, the Executor of the estate of Morris Newman ("Newman"), to specifically perform a stockholder's reciprocal buy-sell agreement (the "Agreement"). It is

a garden variety stockholders agreement, of the type that "have been time and again the subject of judicial determinations and have been held to be valid". *Murphy* v. *George Murphy, Inc.*, 7 Misc. 2d 647, 648-49, 166 N.Y.S. 2d 290, 292 (Sup. Ct. N.Y. Co. 1957). The Agreement was entered into July 12, 1952 by, among others, Newman and the plaintiff-respondent, Abraham Borut ("Borut"). The judgment required Troll to sell to Borut, as the Agreement provided he must, for their original cost, certain shares of stock owned by Newman at the time of his death. In his written decision District Judge Wyatt denied Troll's motion for summary judgment dismissing the complaint and granted Borut's motion for summary judgment ordering specific performance of the Agreement.

The issue presented to the Court of Appeals in this diversity action was whether the District Court, sitting as a court of equity, abused its discretion in ordering Troll to specifically perform the Agreement. Troll now argues that this Court should issue a writ of certiorari because both the Court of Appeals and Judge Wyatt failed to consider whether the equitable doctrine of unconscionability applied to the facts of this case. Troll also argues that this Court should review the judgment below because it is in conflict with a pre-*Erie* case, *Marks* v. *Gates*, 154 Fed. 481 (9th Cir. 1907).

First, there is nothing to Troll's contention at page 6 of his petition that neither Judge Wyatt nor the Court of Appeals "actually considered and passed upon" his argument with respect to unconscionability. Troll's argument is that a court of equity should refuse to specifically enforce a stockholder's reciprocal buy-sell agreement on the ground of unconscionability when there is a great disparity between the purchase price set forth in the buy-sell agree-

ment and the fair market value of the stock at the time of the sale. The portion of Judge Wyatt's opinion printed at pages 14 and 15 of Troll's petition leaves no doubt that Judge Wyatt considered and rejected Troll's argument. And, of course, the Court of Appeals' unanimous affirmance from the bench, on Judge Wyatt's opinion, is testimony not to that Court's failure to consider Troll's points, but rather to the insubstantiality of his argument. Judge Wyatt said:

> The defendant argues that the disparity between the present value of the shares and their "actual cost" makes it unconscionable to enforce the agreement.
>
> This argument was considered and rejected in the *Allen* case (cited above). Judge (then) Fuld said (161 N.Y.S. 2d at 424): ". . . the validity of the restriction on transfer does not rest on any abstract notion of intrinsic fairness of price. To be invalid, more than mere disparity between option price and current value of the stock must be shown."
>
> No New York decision has been found which refused to enforce a buy-sell agreement because of disparity between price and value. There is a dictum in *Palmer* v. *Chamberlin,* 191 F. 2d 532, 540-41 (5th Cir. 1951) which might support defendant, but I decline to accept the dictum under the circumstances of the case at bar. And, as in the *Palmer* case, Newman himself took advantage of the restrictive provisions to purchase shares of Brook in the early years.
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> The treatise already cited states: "The courts, however, have repeatedly refused to invalidate a transfer restriction simply because it required transfer of shares at a price below their value. In some instances, the disparity has been great, the value of the shares being ten, twenty or even over a thousand times as great as the transfer price". 2, O'Neal, at 19

Troll's real complaint, therefore, is that he is dissatisfied with Judge Wyatt's opinion and the New York case law it follows.

With regard to Troll's contention that there is a conflict between the Circuits, we need only say that this case is governed by, and was decided under, New York law, while the *Marks* case, which pre-dates *Erie,* was decided under "federal common law." Moreover, *Marks* involved a promise to transfer property that had not even been acquired at the time the promise was made. Here all the stockholders knew what was involved when they entered into the Agreement and were perfectly aware that the stock's value might appreciate substantially between the date of the Agreement and the time of the death of any one of them.

The District Court and Court of Appeals followed well settled New York case law in ordering specific performance of the Agreement. Their action clearly does not warrant review by the Supreme Court.

The Petition for a Writ of Certiorari Should be Denied.

Respectfully submitted,

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